such motor vehicle such owner shall be liable for any injury or damage caused by any accident which occurs through the negligent driving of such motor vehicle by any person employed by him as a driver of such motor vehicle when not acting within the scope of his employment, or by any other person permitted by him to drive such vehicle, or by any person deputed or permitted by such driver or other person to drive such motor vehicle.

Provided that no proceedings shall lie against an owner by virtue of this section unless the act or omission complained of would apart from this section have given rise to proceedings in tort against the person employed by such owner and that in any such proceedings such owner may avail himself of any defence and any right to require reduction of damages because of the plaintiff's share of responsibility therefor as would have been available to the person employed by such owner;

Provided also that this provision shall not exempt from liability any other person who at common law is also liable for such injury or damage.

In this section 'owner' includes the registered owner and the person in whom the property in the motor vehicle is vested."

Mr. Lee submitted that this section had no application to finance companies. As authority for this, he referred to the definition section of the said Act, section 2, which defines "owner" as follows:

" 'owner' means the person in whose name a motor vehicle is registered by a licensing officer:

Provided that in the case of a vehicle which is the subject of a hire-purchase agreement the term means the person in possession of the vehicle under that agreement;"

Mr. Ong for the plaintiff argued that there was a conflict between section 2 and section 86 and that the latter section, the purpose of which was to extend liability for owners, should prevail over section 2. It was clear from section 86 that the legal owner of a vehicle was liable under the section.

With some regret, I am unable to accept this contention. I see no conflict between the provisions contained in section 2 and section 86.

Section 2 specifically excludes finance companies from the definition of ownership and there is nothing in section 86 which persuades me that it was the intention of the legislature to include finance companies, that is, to include finance companies within the purview of section 86.

I say that I come to this conclusion with regret because it is evident from an affidavit which was placed before me that the defendant's insurers are now insolvent and unless redress can be obtained against the third defendant, the plaintiff has little prospect of recovering any damages for the injuries he has sustained.

In my view, the legislation is quite clear. Section 86 does not extend to finance companies such as the third defendant and it is not even arguable that this is the case. I have therefore come to the conclusion that this appeal must succeed. The relief sought in the third defendant's original summons before Registrar Swed will be allowed.

I will hear the parties on costs.

Appeal allowed.

Solicitors: *Choo Chan & Wong; Ibrahim Chee & Co.*

DSD DILLINGER STAHLBAU GMBH v. ANNIE CHONG & ANOR.

[O.C.J. (Roberts C.J.) 20 & 22 February 1988]

[Bandar Seri Begawan – Civil Suits Nos. 195 of 1985 & 413 of 1986]

Contract – Payment made by plaintiffs to Inland Revenue Department – Claim from defendants.

Conflict of laws – Revenue law – Attempt to enforce in Brunei the revenue laws of another country – Whether sustainable.

The plaintiffs were carrying out work in Labuan at the methanol and power plants. The defendants agreed by an agreement, which both parties said in evidence was entirely oral, to supply labour at rates agreed with the plaintiffs for use by the latter at the methanol and power plants.

During the progress of the agreement, the plaintiffs made certain payments to the defendants. Thereafter, the Inland Revenue Department of Malaysia sought to recover from the plaintiffs 20% of the sums which the plaintiffs had paid to the defendants for the supply of labour. This sum was paid by the plaintiffs to the Inland Revenue Department.

In the present case, the plaintiffs sought, *inter alia*, to recover this sum from the defendants. The defendants also made a counterclaim. The plaintiffs asserted that under section 107A of the Malaysian Income Tax Act, they are obliged to pay to the Inland Revenue Department 20% of all payments made to any non-resident and that it was only when the latter certified the defendants as non-resident that the plaintiffs were obliged to pay.

Held: (1) the plaintiffs must fail in their claim because they were attempting to enforce in Brunei Darussalam the revenue laws of another country;

(2) the defendants were entitled to the counterclaim.

Cases referred to:

(1) *Aiken* v. *Short* (1856) 1 H & N 210, 215; 156 E.R. 1180, 1182.
(2) *Holman* v. *Johnson* (1775) Cowp. 341, 343; 98 E.R. 1120 (cited).
(3) *Government of India* v. *Taylor* [1955] A.C. 491, 514 (refd).

CIVIL SUIT.

Dy. Norila Abu Hassan (*Valentine Willie* with him) for the plaintiffs.

Defendants in person.

Cur. Adv. Vult.

Roberts C.J.: *Preliminary.* In these civil suits, which were consolidated by the Chief Registrar on 13 February the plaintiffs, a company incorporated in the Federal Republic of Germany and registered in Malaysia as a foreign company carrying on business in the territory of Labuan, Malaysia, claim the sum of M$880,600.60, or its equivalent in Brunei currency, and other ancillary relief.

Awang Rambli appeared in person at the trial, both on his own behalf and on that of the first defendant, Mrs. Annie Chong.

He assured me, and I have no reason to disbelieve him, that the first defendant is no more than a sleeping partner, who knew little of the business and had become a partner of his on 10 March 1984, because the Malaysians had insisted that he should have a partner who was a Malaysian, as she was because she had been born in Malaysia. He himself was born in Brunei and a Brunei citizen, though he was in Labuan for much of the time during the currency of the contract with the plaintiffs.

Although the defendants traded as the Sinar (S) Company, the latter was not incorporated at any time and remained a partnership, the second defendant, the husband of the first defendant, remaining as the active partner who undertook all the work.

Background

It has been established to my satisfaction that at the material times in 1983 and 1984, the plaintiffs were carrying out work in Labuan at the methanol and power plants.

The defendants agreed, by an agreement which both parties said in evidence was entirely oral, to supply labour, at rates agreed with the plaintiffs, for use by the latter at the methanol and power plants.

During the progress of the agreement, the plaintiffs made payments to the defendants (which in practice meant the second defendant) of M$4,403,003.02, according to their statement of claim.

About the middle of 1984, the Inland Revenue Department of Malaysia sought to recover from the plaintiffs 20% of the sums which the plaintiffs had paid to the defendants for the supply of labour.

This sum, amounting to M$880,600.60, was paid by the plaintiffs to the Inland Revenue Department of Malaysia from June 1985 onwards.

The plaintiffs assert that, under section 107A of the Malaysian Income Tax Act, they are obliged to pay to the Inland Revenue Department 20% of all payments made to any non-resident and that it was only when the latter certified the defendants as non-resident that the plaintiffs were obliged to pay.

Was 20% deducted?

I must first try to find, though presented with inadequate evidence, whether or not 20%, or any other sum, was deducted by either party at the time of payment, or at any time thereafter, except to the Department itself. As to the latter, I am satisfied that 20%, or M$880,600.60, *was* paid by the plaintiffs to the Department in June 1985 and September 1985.

Mr. Lux, who alone gave evidence for the plaintiffs, was sure that there had been no mention of residence during his negotiations with the second defendant. He assumed, he said, that the contract would be carried out according to law but did not make enquiries himself about status or about holding back any part of the contract sum.

Mr. Lux, though the site engineer for the plaintiffs, had been in charge of all contracts for the supply of labour, including that with the defendants.

Mr. Lux was sure that he did not discover that there was tax to pay before he received a demand in 1984, and that he never discussed this with Awang Rambli.

The second defendant has a different story, though it must be noted that it is not one which he has previously raised, in his pleadings or elsewhere.

In his earlier defence to C.S. 195/85, dated 14 July 1986, the second defendant put forward a number of assertions, in relation to the amount of M$880,600.60, but none of these included any allegation that the 20% had been paid by the second defendant to the plaintiffs at any time.

In his original affidavit of 11 December 1985, the solicitor for the second defendant, acting on the instructions of the latter, put forward objections to the recovery of the amount claimed by the plaintiffs. He did not assert that the second defendant had already paid the amount to the plaintiffs.

In November 1987, the second defendant filed a wholly new defence, striking out the 1986 version and inserting an entirely fresh one. This contained paragraph 18, in which it is said that the plaintiffs had already deducted 20% of each amount in order to pay taxes due.

By paragraph 19 it is said that the sum of M$880,660.60 was deposited with the plaintiffs as it was collected by the plaintiffs' agent whenever payment was made to the plaintiffs.

This was the first time that the second defendant alleged that he was not liable to pay 20% of the first sum which he received from the plaintiffs, because this sum had already been deducted by the plaintiffs.

He asserted in evidence that 20% of all payments to him by the plaintiffs were taken by Mr. Muhlberger or Mr. Reiler, the administrative manager. These amounts were taken in cash and no receipts were given at all.

Awang Rambli was shown a number of instances in which large sums payable for labour had been paid to him by cheque, which he had cashed for the same amount. There was no deduction of 20% for tax or any other reason.

The second defendant agreed that the full amounts were paid to him in each case, but that he thereafter gave cash, amounting to 20%, to Mr. Muhlberger or Mr. Reiler.

He was unable to call Mr. Muhlberger to give evidence, since he could not trace him. Nor were the plaintiffs able to find him, as he has left the service of the company.

In his absence, and that of Mr. Reiler, I must decide on the sparse evidence which I have of those transactions. I am satisfied that the plaintiffs have established, on a balance of probabilities, that there was no mention of tax in the oral agreement which they entered with the defendants for the supply of labour in 1983 in Labuan.

Mr. Lux, who negotiated the contract with the second defendant, did not mention Malaysian tax. And I am sure that the defendant is in error in his recollection when he says that there was in each case a handing back by him of 20% of what was paid to him. As Mr. Lux said, he did not know of this.

If there had been such a return of cash by him, Mr. Lux would have known about it, a receipt would have been given and the second defendant would have mentioned it as his defence from the outset.

I am satisfied that there was no mention of the status of the defendants when the contract was concluded orally between Mr. Lux and Wang Rambli because it was then assumed by all parties that the defendants were local residents under Malaysian tax law.

Therefore, the amount of M$880,600.60, which the plaintiffs paid, was due from them to the Malaysian Inland Revenue Department as a withholding tax, under section 107A of the Malaysian Income Tax Act if, of course, that Department was correct in its assessment of the defendants as non-resident.

Was this a revenue payment?

I do not accept the argument of the plaintiffs that this amount was paid by the plaintiffs in such circumstances that was reclaimable by them as money paid under a mistake of fact, in accordance with the principles of *Aiken* v. *Short*.[1]

I have no doubt that the payment of M$880,600.60 which the plaintiffs made to the Inland Revenue Department of the Malaysian government was a payment due under the Malaysian Income Tax Act, which is without doubt, and this is agreed by both parties, a revenue measure designed solely to govern the raising of finance for the Malaysian government.

The payment by the plaintiffs was therefore made by them for the purposes of revenue law and for that reason only. It was made by them as the outcome of a determination of the status of the defendants, although they were themselves not able to dispute this finding before the plaintiffs were obliged to pay.

Under section 107A(3)(c) of the Act, the payer, that is to say, the plaintiffs in this instance, are entitled to attempt, if they paid a withholding tax under that section, to recover it. This they have tried to do in Brunei Darussalam. Even though the statement of claim does not in terms provide that this is the essence of the claim, it is clear from a general reading of it that the plaintiffs have sought to enforce here a debt contracted under the tax law of Malaysia.

It was first established as early as 1775 that "no country ever takes notice of the revenue laws of another": see Lord Mansfield in *Holman* v. *Johnson.*[2]

This means that the Brunei courts, in which the common law applies, will not enforce a foreign revenue law – see *Government of India* v. *Taylor,*[3] on the general principle that tax gathering is a matter of administration between the state and those within its jurisdiction.

This is an attempt by the plaintiffs to achieve enforcement of the Malaysian tax law, which confers on the payer of a withholding tax remedies to be pursued in Malaysia.

I should perhaps make it clear that I do not criticize the plaintiffs for attempting to recover from the defendants in Brunei Darussalam a substantial sum of money which, according to my finding, was paid by the plaintiffs because the Malaysian Inland Revenue Department decided that the defendants were non-residents of Malaysia for tax purposes.

I must, nevertheless, conclude that the plaintiffs fail in their claim and that this must be dismissed, because they are attempting to enforce in Brunei Darussalam the revenue laws of another country.

It may be that, if they pursue the defendants in Labuan under the Malaysian Act, they would be more fortunate.

Counterclaim

As I have indicated above, the plaintiffs' claim fails, not on its merits, but under the rule that a foreign revenue law shall not be enforced in another country.

However, I reject the suggestion made in paragraph 14(a) of the defence of 12 November that the plaintiffs had no *locus standi.* I have no doubt that they were a registered limited company, that they were operating in Malaysia, with authority to do so, though this is not relevant, and that they were entitled to sue the defendants for the recovery in Malaysia of tax paid on the defendants' behalf.

It is not for me to give the declaration sought in paragraph 14(b). This is a matter for the Malaysian Inland Revenue Department or, if the latter's ruling is challenged, for the Malaysian courts. It is not for me to decide this matter.

I do not find that the second defendant has shown that the plaintiffs wrongfully collected any sum from him. Indeed, I have concluded that no such sum was given by the second defendant to the plaintiffs at any time (paragraph 14(c)).

It follows from my conclusion on paragraph 14(b) and paragraph 14(c) that I will not order that the plaintiffs should refund to the defendants the sum claimed under paragraph 14(d) of the defence of 12 November.

Although I am satisfied that the second defendant has established that his counterclaim should succeed, to the extent of M$10,158.25, as he claims in paragraph 14(c) of the counterclaim, I must remark that no details of this amount appear in the pleadings and that, if he were not a litigant in person, I should have disallowed the item unless it were particularized.

The second defendant has produced a voucher, addressed by the manager of Sinar (S) Company to the Malaysian Income Tax Department, dated 27 October 1984. This shows that a sum of M$10,158.25 has not yet been paid to the Sinar (S) Company for the period 1 March to 30 September 1984.

This is the sum which the second defendant claims by way of counterclaim and it appears, by virtue of Mr. Frez's letter on behalf of the plaintiffs, that this is not challenged.

Indeed, Mr. Lux, giving evidence for the plaintiffs, testified that he thought that, as a result of a dispute with Sinar (S) Company which arose about

tax at a late stage, the plaintiffs still owed "about M$20,000 or so" to Sinar (S) Company, though there seemed to have been some over-payment.

On balance, I am sure that the second defendant has proved that the plaintiffs owe him the sum of M$10,158.25. This was due to him under the oral contract, was in one of the invoices submitted by him, was due to him and was not paid by the plaintiffs. As there was no agreement between the parties as to deduction of 20% of the sums paid by the plaintiffs to the defendants, the latter were entitled to the full amount, on all payments, including the M$10,158.25.

There should, therefore, be judgment for the defendants on the counterclaim only for M$10,158.25, plus interest at 6% from 30 September 1984, when the money was due, until the date of judgment herein.

Costs

I have decided that the plaintiffs were not entitled to succeed on their main claim, not because there may be no merits in their favour, as to which I did not reach any finding, but because it is not open to any country to enforce the revenue laws of another.

It must follow that the defendants are entitled to their costs and on the claim, even though these are unlikely to be large, since they were not legally represented except at earlier stages of the proceedings against them.

Security for the costs of the defendants has already been lodged, in the sum of B$50,000 by means of a bank guarantee which has been given on behalf of the plaintiffs.

The costs of the defendants on the claim should be taxed and the balance paid to the plaintiffs.

So far as the counterclaim is concerned, the costs of this are very small as a separate issue, since these are largely absorbed in the costs of the main action by the plaintiffs. I therefore make no order as to the costs of the counterclaim.

Order accordingly.

Solicitors: *D.F. Abang Zen.*

MALAYSIAN REPORTS

UNITED GENERAL INSURANCE CO. SDN. BHD. v. PROGRESS CREDIT SDN. BHD.

[S.C. (Seah, Hashim Yeop A. Sani & Syed Agil Barakbah S.C.JJ.) 10 March & 21 May 1988]

[Kuala Lumpur – Supreme Court Civil Appeal No. 120 of 1987]

Insurance – Motor car insurance policy – Endorsement in policy – Hire purchase agreement – Effect of endorsement – Insured not deemed the agent or trustee or the owners under hire purchase agreement – Prohibition of assignment of rights, benefits and claims under the policy.

In this case, the insurance policy taken out by the insured covering a motor vehicle, which was the subject of a hire purchase agreement with the respondent, contained an endorsement in the following terms:

"It is hereby understood and agreed that Progress Credit Sdn. Bhd. (hereinafter referred to as "the owners") are the owners of the motor vehicle and that the motor vehicle is the subject of a hire purchase agreement made between the owners of the one part and the insured of the other part. It is further understood and agreed that any payment made in respect of loss or damage (which loss or damage is not made good by repair reinstatement or replacement) under section 1 of this policy shall be made to the owners as long as they are owners of the motor vehicle and their receipt shall be a full and final discharge to the corporation in respect of such loss or damage. *It is also understood and agreed that notwithstanding any provision in the hire purchase agreement to the contrary, this policy is issued to the insured, namely, Wong Kim Miew, as the principal party and not as agent or trustee for the owners and nothing herein shall be construed as constituting the insured as agent or trustee for the owners or as an assignment (whether legal or equitable) by the insured to the owners of his rights benefits and claims under this policy. It is lastly understood and agreed that the insured shall not assign his rights benefits and claims under this policy without the prior consent in writing of the corporation* (emphasis given). Subject otherwise to the terms of the policy."

The respondent in this case brought an action against the appellant (the insurance company) in its own name. Judgment was given in favour of the respondent in the High Court on appeal from the Sessions Court and the appellant appealed.

Held, allowing the appeal: (1) the amended endorsement in this case ousted the application of *Malaysian Australian Finance Co. Ltd.* v. *The Law Union & Rock Insurance Co. Ltd.*(1) and that case was therefore distinguishable from the facts of the present case. The amended endorsement curtailed the right of the respondent as legal owner of the motor vehicle from bringing the suit against the appellant in its own name;

(2) the rights regarding assignment were clearly set out in the amended endorsement and as no written consent duly signed by the appellant was produced, there was no lawful assignment of the policy by the insured to the respondent.